

MONTANA LEGISLATIVE HISTORY

Chapter 583 ~~to~~ 2001

Bill H _____ S 4 Original bill & history X C

H. Committee on JUDICIARY

Hearing Date(s) 3/1 X C

EXEC ACTION _____ C

_____ C

_____ C

Date Out _____ C

S. Committee on JUDICIARY

Hearing Date(s) 1/8 X C

EXEC ACTION 1/11 X C

EXEC ACTION 1/12 X C

_____ C

NO EXHIBITS

Did this bill originate in an interim committee? ____ Yes ____ No

Committee _____

Report _____

CONF. COMMITTEE : 3/23

4/19 → NO EXHIBITS AVAILABLE

SENATE BILL NO. 4

INTRODUCED BY D. GRIMES

BY REQUEST OF THE LAW, JUSTICE, AND INDIAN AFFAIRS INTERIM COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING THAT DURING A PROBATIONARY PERIOD, EMPLOYMENT MAY BE TERMINATED FOR ANY REASON CONSIDERED SUFFICIENT BY THE TERMINATING PARTY; CLARIFYING THAT THE TERMINATION OF NONPROBATIONARY EMPLOYMENT MUST BE FOR CAUSE; AMENDING SECTIONS 39-2-902, 39-2-904, AND 39-2-905, MCA; AND REPEALING SECTION 39-2-503, MCA."

WHEREAS, in Whidden v. John S. Nerison, Inc., 1999 MT 110, 294 Mont. 346, 981 P.2d 271 (1999), the Montana Supreme Court held that the at-will employment statute, section 39-2-503, MCA, had been impliedly repealed by the Wrongful Discharge From Employment Act, Title 39, chapter 2, part 9, MCA.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 39-2-902, MCA, is amended to read:

"39-2-902. Purpose. This part sets forth certain rights and remedies with respect to wrongful discharge. ~~Except as limited in this part, employment having no specified term may be terminated at the will of either the employer or the employee on notice to the other for any reason considered sufficient by the terminating party.~~ Except as provided in 39-2-912, this part provides the exclusive remedy for a wrongful discharge from employment."

Section 2. Section 39-2-904, MCA, is amended to read:

"39-2-904. Elements of wrongful discharge. (1) A discharge is wrongful only if:

~~(1)(a)~~ it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy;

~~(2)(b)~~ the discharge was not for good cause and the employee had completed the employer's probationary period of employment; or

1 ~~(3)(c)~~ the employer violated the express provisions of its own written personnel policy.

2 (2) During a probationary period of employment established by the employer, the employment may
3 be terminated at the will of either the employer or the employee on notice to the other for any reason
4 considered sufficient by the terminating party."

5

6 **Section 3.** Section 39-2-905, MCA, is amended to read:

7 **"39-2-905. Remedies.** (1) If an employer has committed a wrongful discharge, the employee may
8 be awarded lost wages and fringe benefits for a period not to exceed 4 years from the date of discharge,
9 together with interest ~~thereon~~ on the lost wages and fringe benefits. Interim earnings, including amounts
10 the employee could have earned with reasonable diligence, must be deducted from the amount awarded
11 for lost wages. Before interim earnings are deducted from lost wages, there must be deducted from the
12 interim earnings any reasonable amounts expended by the employee in searching for, obtaining, or
13 relocating to new employment.

14 (2) The employee may recover punitive damages otherwise allowed by law if it is established by
15 clear and convincing evidence that the employer engaged in actual fraud or actual malice in the discharge
16 of the employee in violation of 39-2-904(1)(a).

17 (3) There is no right under any legal theory to damages for wrongful discharge under this part for
18 pain and suffering, emotional distress, compensatory damages, punitive damages, or any other form of
19 damages, except as provided for in subsections (1) and (2)."

20

21 NEW SECTION. **Section 4. Repealer.** Section 39-2-503, MCA, is repealed.

22

- END -

MINUTES

**MONTANA SENATE
57th LEGISLATURE - REGULAR SESSION
COMMITTEE ON JUDICIARY**

Call to Order: By **CHAIRMAN LORENTS GROSFIELD**, on January 8, 2001
at 10:04 A.M., in Room 303 Capitol.

ROLL CALL

Members Present:

Sen. Lorents Grosfield, Chairman (R)
Sen. Duane Grimes, Vice Chairman (R)
Sen. Al Bishop (R)
Sen. Steve Doherty (D)
Sen. Mike Halligan (D)
Sen. Ric Holden (R)
Sen. Walter McNutt (R)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)

Members Excused: None.

Members Absent: None.

Staff Present: Valencia Lane, Legislative Branch
Cecile Tropila, Committee Secretary

Please Note: These are summary minutes. Testimony and
discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: SB 63, SB 4, SB 1, SJR 2
Executive Action: SJR 2

HEARING ON SB 63

Sponsor: SEN. JON TESTER, SD45, BIG SANDY

Proponents: Riley Johnson, Northern Rockies Rental Assoc.
Kevin Pierson, Strobels' Rentals Great Falls, MT.
Dan Jacques, A-1 Rentals, Helena, MT.
Roland Schumaker, ABC Rental, Bozeman, MT.

SEN. HALLIGAN stated that they are not paying for it pursuant to the agreement that they originally signed at your business. These customers have gone beyond that time frame, and if there has been no agreement extending that, signing anything, they could say they are still using it, and they may be filing for bankruptcy in a couple of days.

Kevin Pierson explained the customer could extend the contract if they wished.

CHAIRMAN GROSFIELD asked Mr. Pierson why he chose twelve hours from the original 48?

Kevin Pierson answered to try and reduce our time of not having our money as much as possible, in all honesty forty-eight hours gives a person a lot of time to go a long distance and unfortunately we are dealing with a lot of out-of-state contractors.

CHAIRMAN GROSFIELD asked if most of these businesses are open twelve hours a day?

Kevin Pierson answered seven days a week. He also added that for clarification, the twelve hours was twelve hours more to pay for it after it was returned. Not after it was due. He felt "failure to return within forty-eight hours" could be left in, but the "failure to pay for" doesn't need to be more than twelve hours after the actual return.

Closing by Sponsor:

SEN. JON TESTER, SD 45, BIG SANDY summarized by that the rental association folks are getting hit rather hard on non-payment and this bill it is to address that issue. He also commented that this is a problem that impacts businesses in the state that are trying to provide services, and are having a hard time retrieving the money.

HEARING ON SB 4

Sponsor: **SEN. GRIMES, SD 20 CLANCY**

Proponents: **Jim Nys, Society for Human Resources**
 Al Smith, Trial Lawyers Association
 Aidan Myhre, MT Chamber of Commerce
 Mike Meloy, Member of Trial Lawyers Assoc.
 Don Judge, AFL-CIO
 Riley Johnson, Northern Rockies Rental Assoc.

Opponents: **Leroy H. Schram, MT. University System**

Opening Statement by Sponsor:

SEN. GRIMES, SD 20 CLANCY stated that Senate Bill 4 is by request of the Law, Justice, and Indian Affairs Interim Committee. He added that this is referenced in the "whereas" section, which is the Whidden decision. The Montana Supreme Court held that the at-will employment statute had been impliedly repealed in 1987 by the Wrongful Discharge from Employment Act. There is some question to the efficiency of the Whidden decision and there may be some opponents to the bill who propose waiting to amend the law to see if it is overthrown.

The purpose of this bill is to clean up the language, clarify it, and make sure that someone with a superficial reading of the at-will employment statute, that we are deleting, doesn't take a cavalier attitude towards permanent employees.

Proponents' Testimony:

James A Nys, Society for Human Resources EXHIBIT(jus05a01) said that in the written testimony that is being circulated two italicized and indented paragraphs show the relevant portions of the Whidden decision that are reflected in the language of the bill. It simply points out that the conflict between the old at-will statute that has been on the books since the turn of last century and the Wrongful Discharge Act, which was adopted in 1987. Even though the legislature put language in the preamble to the Wrongful Discharge Act, to try and preserve some form of at-will employment, the court decided that there was an inherent conflict.

Al Smith, Trial Lawyers Association said that having worked both sides of it, the one being hired and the one hiring people, this bill would be fair for both sides for that initial probationary period.

Adian Myhre, MT Chamber of Commerce stated that the probationary period is a very good management tool for businesses and again it allows the opportunity for both the employer and the employee to identify this is as a good employment fit. Whether that period be a three month, six month or twelve month period, again it helps them make sure the employee will work well within their organization, buy into their philosophies and management practices, and hopefully be a long term employee and contribute to that business.

Mike Meloy, Member of Trial Lawyers Assoc. pointed out that this bill does two things, the first is to correct the disparity that has been in the law since 1987 when this legislature passed a "good cause" requirement for employment relationships and left the at-will statute intact.

{Tape : 1; Side : B begins; Approx. Time Counter 25 minutes}

Secondly, it makes it clear that it is still an at-will employment during the employment relationship, and this fixes the situation that existed so many times in the past when a probationary employee was not working out and the employer went to his or her lawyer and asked what can be done and the lawyer looks at the statute and the supreme court decisions and says you can terminate this person for any reason. This bill is a very good bill.

Don Judge, AFL-CIO stated that he believes this bill clarifies the probationary period as a time when both parties, the worker and the employer, are able to sit down and negotiate whether or not long term employment is right for either party, and to separate that employment relationship without any real retribution.

Riley Johnson, Northern Rockies Rental Assoc. represents the National Federation of Independent Businesses and mentioned that N.F.I.B has small employers, almost 8,000 in the state of Montana and they stand in support of this bill as fairness for both the worker and for the employer.

Opponents' Testimony:

Leroy Schram, MT. University System mentioned that he felt something needs to be done with response to the Whidden decision, and he is suggesting some amendments that are being handed out.
EXHIBIT(jus05a02)

He added that the at-will employment would be wiped out and that over the years our employees were at-will and now they are no longer at-will employees. Because they do not have a probationary system and it is not that a probationary system is set up, even large groups of employees do not have that system.

Those employees are then, the minute they come in the door, can only be terminated for cause, and if you let them go that means before they could not go to the court and pursue a wrongful discharge under the Wrongful Discharge Statute unless they said it was against public policy. It can be tested and you have to

convince a jury or a judge that yes it is not working out and that is a valid reason.

He added that this bill would bring more clarity to the law as the present language if people are looking for clarity and it preserves the right of the employers to hire at-will.

Questions from Committee Members and Responses:

SEN. O'NEIL asked as a small employer, if they hire someone for awhile and then their son comes back from college would they be allowed to lay off that employee and put their son on?

Leroy Schram answered if in fact you are hired for an indefinite term, if it really means an indefinite term, you can be terminated for any cause.

SEN. HALLIGAN asked what has been seen in practice with respect to the at-will issue for employees hired for indefinite terms? Has the confusion been out there with respect to non-covered areas?

Mike Meloy answered he couldn't think of any case in which an employer has defended a non-probationary firing on the basis that the person is at-will. He also said that the policy of ending at-will employment occurred in 1987 and when a person walks into an employment situation on day one, if there is no probationary period then termination of that employee is going to be for cause.

SEN. HALLIGAN asked if the industry believes that they have to fire for a cause and what are businesses doing and why not put that into law?

Leroy Schram answered there is always some reason for firing an employee.

SEN. HALLIGAN asked Mr. Nys to answer the question also, since he handles personnel work.

Jim Nys answered that in his experience, since the 1987 enactment of the Wrongful Discharge Act, he has been telling people they need to have a reason. Because when there is a termination it is not potentially subject to the Wrongful Discharge Act, you also have to be concerned about other potential causes such as discrimination laws.

SEN. PEASE asked how did this bill come out with the Law, Justice and Indian Affairs Interim Committee? Are you a part of that committee also?

SEN. GRIMES answered yes he was. He added that these bills typically come at the request of the code commissioner, Greg Petesch.

Greg Petesch, Legislative Staff - Code Commissioner remarked that historically for changes in the law, that are not appropriate for inclusion in the code commissioner bill, which is intended to be non-substantive technical corrections. He would appear at the first meeting of this committee and propose several pieces of legislation that were needed to clarify provisions in law that the court would either find in conflict with each other, invalid or something else.

Closing by Sponsor:

SEN. GRIMES, SD 20 CLANCY summarized by saying this bill obviously is needed because of this decision. The net effect could be that this would change the way university system and perhaps others view provisional employees, or at-will employees. Given the nature of those hirings, it does say in the bill that the probationary period can be defined by the employer.

HEARING ON SB 1

Sponsor: SEN. GRIMES, SD 20 CLANCY

Proponents: Jim Nys, Society for Human Resources
Riley Johnson, N.F.I.B
Adian Myhre, Montana Chamber of Commerce

Opponents: Mike Meloy, Member Trial Lawyers Assoc.
Don Judge, AFL-CIO
Al Smith, Montana Trial Lawyers Assoc.
Tom Bilodeau, Researcher for MEA-MFT

Opening Statement by Sponsor:

SEN. GRIMES, SD 20 CLANCY stated this was a proposal in 1999 legislature and those bills in that legislature went through the business committees and they obviously had some technical legal issues. He added perhaps we can correct some of those deficiencies by working through the Judiciary Committee where they should be appropriately be considered.

Testimony of James A. Nys
Representing the Society for Human Resource Management (SHRM)

Senate Bill 4 is intended to "clean up" the Montana Code provisions that deal with the subject of Wrongful Discharge from Employment (WDFEA) and to conform the code to the Montana Supreme Court Decision in Whidden v. Nerison (1999 MT 110, May 25, 1999).

The WDFEA was adopted in 1987 as a compromise between the employer's right to fire an employee "at will" and the employee's right to full recovery when such discharges were "wrongful." The compromise was the nation's first law on Wrongful Discharge and has, I believe, employers and employees well in the nearly 14 years since it took effect.

In 1999, the Montana Supreme Court addressed the apparent conflict between the Wrongful Discharge Act and the Montana "Employment At Will" statutes. The Court found that:

"Sections 39-2-503 and 39-2-904(2), MCA, clearly conflict. Under § 39-2-503, MCA, a non-probationary at-will employee may be discharged without good cause. However, under §39-2-904(2), MCA, an employer must have good cause before discharging a non-probationary employee."

In order to resolve the conflict, the court declared:

"... we hold further that the WDFEA has superseded and impliedly repealed the at-will act. The legislature has characterized the operation of the WDFEA upon the at-will act as a limitation of the at-will act. See § 39-2-902, MCA (providing "except as limited in this part, employment having no specified term may be terminated at the will of either the employer or the employee"); § 39-2-503, MCA (providing "an employment having no specified term may be terminated at the will of either party on notice to the other, except where otherwise provided by this chapter"). Despite this characterization, we conclude that the WDFEA has effectively eliminated the at-will act. The plain meaning of § 39-2-904(2), MCA, again, is that outside of the probationary period of employment, an employer may not discharge an employee without good cause... However, we recognize that under § 39-2-904(2), MCA, the good cause requirement applies to an employee upon completion of a probationary period. The employer must define the probationary period at the outset of an employment relationship, and the employer has the burden of showing that a probationary period was in effect at the time of a discharge."

The members of SHRM support elimination of language that could lead an employer to mistakenly conclude that unrestricted Employment At Will exists in Montana. We believe SB 4 accomplishes that goal by eliminating the obsolete "At Will" provisions codified in 39-2-503 MCA and eliminating the language in 39-2-902 MCA that refers to the At Will statute. SB 4 also clarifies the original Legislative intent and the Supreme Court's observation that the good cause requirement does not apply during the employee's probationary period by inserting a new subsection (2) in 39-2-904.

In the weeks following the Whidden decision some suggested that it was appropriate to consider revising or repealing the WDFEA in order to reinstate the At Will doctrine in Montana law. The members of SHRM prefer the approach taken by SB 4 because we would not favor a return to the days of the ambiguous employer responsibilities and rights and the resulting multi-million dollar wrongful discharge cases that the WDFEA was originally enacted to remedy.

The members of SHRM recommend your favorable consideration of SB 4.

SENATE JUDICIARY

James A. Nys
910 E. Lyndale, Helena, MT 59601
443-7169
jnys@westaf.com

SENATE JUDICIARY

FILE NO. 1

DATE Monday Jan 8, 2001

BILL NO. 4

RECEIVED

9/1/97

SB 4

Summary of Testimony Before Senate Judiciary Committee
January 8, 2001

LeRoy H. Schramm
Chief Legal Counsel

Montana University System

Author: "Montana Employment Law and the 1987 Wrongful Discharge From Employment Act: A New Order Begins," 51 Montana Law Review 94-125 (Winter, 1990).

* SB 4 amends the Wrongful Discharge From Employment Act (WDFEA) enacted by the legislature in 1987 (Chapter 641, Laws of 1987 codified at 39-2-901ff. MCA).

* Montana law traditionally recognized four kinds of employment relationships.

1. Employment governed by a collective bargaining agreement. Neither WDFEA nor SB 4 deal with these relationships.
2. Employment for a specific term under a written contract. Neither WDFEA nor SB 4 deal with these relationships.
3. Employees operating under a probationary/permanent system. That is, once an employee has completed a probationary period of employment specified in an employer's personnel policy the employee can only be discharged for "cause." WDFEA codified this right for the first time and made it legally enforceable.
4. At-will employment. When a non-union employee is hired with no specific term specified and no probationary period is designated the employment can be ended by either party and no reasons need be given. SB 4 wipes out this status and says employees hired for an indefinite term are immediately upon hire to be treated as permanent employees who can be let go only if the employer shows "good cause." Such employees can bring a wrongful discharge suit to contest any discharge.

* The 1987 Legislature tried to make clear that the WDFEA did not eliminate at-will employment in Montana. The at-will statute (39-2-503), originally passed in 1895 and virtually unchanged for 100 years, was left on the books. In addition, the principle of at-will employment was repeated within WDFEA itself (39-2-902).

* In 1991 the Montana Supreme Court acknowledged that WDFEA presumed the continuing existence of at-will employment (*Medicine Horse v. Big Horn County School District*, 251 Mont. 65).

* In 1999 the Court did a complete 180-degree shift and decided that WDFEA had eliminated at-will employment. This wiped out over 100 years of Montana statutory law without any clear action by the Legislature. Ironically, the Court viewed as ambiguous the language the Legislature used to preserve at-will employment and said instead that at-will employment had been eliminated.

* As a result of the 1999 decision any employee who is hired for an indefinite term can only be discharged for "cause." "Cause" for such discharge is ultimately determined not by the employer, but by a court. This is an invitation for litigation over every discharge of every employee who is hired under something other than a specific term contract. Employees who are hired for "as long as needed" or "as long as things work out" or some other similar term can now sue whenever they are terminated and get the matter reviewed by a jury to see if employer's reason for discharge rose to the level of "good cause."

* This affects large employees such as the University System who hire hundreds of employees, most of them students, each year for indefinite terms. It also affects thousands of small and occasional employers in the state who hire people without either written contracts or formally developed written probation policies. When such employment is ended SB 4 will allow it to be challenged *in every instance* by a wrongful discharge suit alleging the employer lacked "good cause."

* Rather than writing into statute the Supreme Court's mistaken 1999 opinion in *Whidden v. Nerison*, 294 Mont. 346, this Legislature should make clear that at-will employment still exists in Montana. This can easily be done by amending SB 4 as indicated in the attached amendment. The amendment preserves at-will employment while at the same time preserving the right of at-will employees to be protected from discharges made in violation of public policy or in violation of an employer's own personnel policies, both rights codified by WDFEA in 1987.

Amendments to SB 4

SB 4, the introduced bill, is amended as follows:

Page 2, after line 4. Add a new subsection under (2) to read: (a) If no specific probationary period is established by the employer the employment is governed by the provisions of 39-2-503, as well as subsections 1(a) and 1(c) of this section.

Page 2, line 21. Delete Section 4.

Amend the title as follows.

Page 1, line 8. Delete "MUST BE FOR CAUSE" and in its place insert "TS GOVERNED BY THE AT-WILL PROVISIONS OF 39-2-503".

Page 1, lines 8 and 9. Delete "; AND REPEALING SECTION 39-2-503, MCA".

DATE JAN. 7, 2001SENATE COMMITTEE ON JUDICIARYBILLS BEING HEARD TODAY: SB 1, SB4, SB63, SJR 2**PLEASE PRINT**

NAME	PHONE	REPRESENTING	BILL #	SUPPORT	OPPOSE
Jim Nys	443-7169	Self + Society for Human Resource	SB 1 SB 4	✓	
Don Judge	442-1708	MT AFL-CIO	SB 1 SB 4	✓	✓
Randy Bulsen	444-2706	DPHHS	SS 2	✓	
SHARON HOFF	442-5761	MT Catholic Conference	SS 2	✓	
Gloria Paladichuk	443-0726	CITY OF GLENDUE Richland Econ. Develop.			
LeRoy H. Schum	444-6570	MT. Univ. System	SB 4		✓
Riley Johnson	443-3797	Northern Rockies Rental	SB 63	✓	
Rolando Schumacher	587-0728	ABC Rental	SB 63	✓	
Karolin J. Loendorf	447-8304	Lewis & Clark County	SJR	✓ + amendment	
Riley Johnson	443-3797	NEFB	SB-4 SB-1	✓	
DAN JACQUES	442-7090	A-1 RENTAL	SB 63	✓	
Aldan Myhre	442-6383	MT. Chamber of Commerce	SB 1 SB 4	✓	
Kevia Pierson	727-9333	Strobel's Rental	SB 63	✓	

Kathy McGowan 443-1570 MCCMHC SJ 2 ✓

VISITOR REGISTER

Jim Smith Sheriff Assoc. SJ 2 ✓

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

DATE Jan. 7, 2001

SENATE COMMITTEE ON Judiciary

BILLS BEING HEARD TODAY: _____

PLEASE PRINT

NAME	PHONE	REPRESENTING	BILL #	SUPPORT	OPPOSE
Keith Allen	442-3185	IBEW 233	SB1		X
BETTY WHITING	860-3969	MT ASSOC. OF CHURCHES	SJ2	X	
Bonnie Ade	4-9669	MA Ombudsman	SJ2	X	
Tom Bilodeau	442-4250	WED-MFT	SB1		X
Donald Harry, M.D.	248-8291	MT. Psychiatric Association	SJR2	X	
Winnice Ore, DDC	444-7795	Dept of Corrections	SJ2	X	
Sandra McIntire	458-9738	NAMI-MT	SJ2	X	
Jani McCall	442-0216	Child N.H. Providers Deac Blps Clinic	SB2	X	
Gene Haive	444-3955	Mental Disabilities Board of Visitors	SJR2	Y	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

MINUTES

MONTANA SENATE 57th LEGISLATURE - REGULAR SESSION COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN LORENTS GROSFIELD**, on January 11, 2001 at 9:09 A.M., in Room 303 Capitol.

ROLL CALL

Members Present:

Sen. Lorents Grosfield, Chairman (R)
Sen. Duane Grimes, Vice Chairman (R)
Sen. Al Bishop (R)
Sen. Steve Doherty (D)
Sen. Mike Halligan (D)
Sen. Ric Holden (R)
Sen. Walter McNutt (R)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)

Members Excused: None.

Members Absent: None.

Staff Present: Anne Felstet, Committee Secretary
Valencia Lane, Legislative Branch

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: SB 6, SB 7, 1/5/2001
Executive Action: SB 4, SB 63

EXECUTIVE ACTION ON SB 4

Motion: SEN. GRIMES moved the amendments to SB 4.

Discussion:

SEN. DUANE GRIMES opened discussion with the amendments drafted between Mr. Leroy Schram, Montana University System, and Jim Nys, Society for Human Resources, EXHIBIT(jus08a01), EXHIBIT(jus08a02).

SEN. GRIMES said the bill created some problems because by deleting entirely the 'at-will' section of the law, employers were left vulnerable if they didn't have an established probationary period. A good example of this was farmers and ranchers. If they did not have a formal probationary period, and the at will clause was eliminated, those employees would become permanent employees from the day they started. Therefore, the amendments created a presumptive probationary period. So farmers and ranchers, or any small employer who did not have a probationary period, would automatically be granted a one year presumptive probationary period. The amendments also encompass the Whidden vs. Nerison Supreme Court case regarding at-will employment. With the amendments, SB 4 applied the Whidden decision to retain at will employment for probationary period employees, even for smaller employers without a formalized probationary period. The amendments also clarified the last sentence, especially in light of temporary employees working for temporary service agencies.

CHAIRMAN LORENTS GROSFIELD said Valencia Lane, Legislative Staffer, would have to draft the amendments, but in the meantime, the committee could discuss them. Executive Action would have to wait for the official draft of the amendments.

SEN. JERRY O'NEIL asked if the amendment removed at-will employment from the employers in Montana, or if it continued it for a year instead of six months.

SEN. GRIMES told him it still repealed the at-will section that was in the code, however, it did not repeal a current right that employers thought they had for at will employment. SEN. GRIMES explained employers gave up that right in 1987 for permanent employees by adopting the Wrongful Discharge Act in exchange for not being sued. Currently, there was not such a thing as at-will employment in the state of Montana for permanent employees.

SEN. O'NEIL then asked the purpose of the bill.

SEN. GRIMES replied SB 4 implemented the decision handed down in the Whidden vs. Nerison court case in which the Supreme Court said the at-will employment section was impliedly repealed. Therefore, SB 4 acknowledged that case but said, at-will employment wasn't impliedly repealed, but was left in place for probationary employees. However, it understood that employers in Montana could get themselves into trouble by mis-applying that at-will section. So, SB 4 removed at-will employment but continued the current practice of at-will employment for probationary employees. The amendments took it one step further by adding a presumptive probationary period; just in case some small employer--farmer, rancher, business man--did not specifically have a structured probationary policy in effect. **SEN. GRIMES** summed it up saying SB 4 implemented the Whidden decision and made it a little more secure in the case of probationary employees.

SEN. STEVE DOHERTY thought a presumption of a probationary period would be extremely helpful to both sides and would be fair, but thought a year was probably too long. He suggested 90 or 180 days, but didn't know which was better.

SEN. GRIMES replied that the time frame was amendable and that the bill did not prevent employers from establishing their own time frame. He thought 90 days was far too short for a number of reasons, but was amenable to six months.

SEN. MIKE HALLIGAN offered that he had to extend someone's probation. He suggested six months as the presumption, however, there could be an ability to extend it. In his case, he had to do some paperwork to make sure people understood what was going on.

SEN. GRIMES cautioned that the idea of six months plus the extension was good, but it would be something new in law. He acknowledged there was some case history, but state government, in particular, could cause trouble, especially unionized employees.

CHAIRMAN GROSFIELD questioned the need for an extension because the amendments seemed to say an employer could determine the time frame.

SEN. GRIMES answered there was nothing that prohibited somebody from establishing six months or even less on a probationary period. The language did not preclude that. He felt the committee should set the time frame and stay away from extensions.

SEN. O'NEIL commented that in order to protect the small employer, the one year probationary period should be kept.

CHAIRMAN GROSFIELD reiterated if it was put at a year an employer could put it at six months or nine months, but that still didn't take care of the extension issue that came up. He sensed that the committee agreed with establishing a probationary period and suggested they discuss the time frame to provide Valencia a specific time.

SEN. DOHERTY questioned the fairness of extensions to the probationary period. He felt it altered the terms of the original agreement.

SEN. HALLIGAN respectfully disagreed. He said the way the state policies operated, the probationary period could be extended for whatever reasons. He said it took work, but was absolutely critical that it be done.

SEN. DOHERTY countered that was for the state who had several personnel people, a well established manual, and a well established policy. But this went beyond state people, it affected the small non-profit agency who hired an executive director and one employee, or the small business who had one main revenue generator and one employee, who may not have had a personnel policy or personnel director.

SEN. GRIMES said the discussion revealed that different employers had different time frame needs.

SEN. WALT McNUTT presented a different reason for a one year probationary period. He suggested some latitude might be what the bill needed.

SEN. O'NEIL pointed out that the committee was setting the default and many small employers would use whatever was established.

CHAIRMAN GROSFIELD asked **Ms. Lane** if, other than the time line, the amendments looked like they would work?

VALENCIA LANE, Legislative Staffer, said yes.

CHAIRMAN GROSFIELD asked if the committee wanted to advise **Valencia** as to a time frame.

SEN. GRIMES suggested the draft use 12 months.

CHAIRMAN GROSFIELD closed discussion on SB 4.

MEMO

TO: Jon Sullivan and Jim Nys

FROM: LeRoy H. Schramm

RE: SB 4 Amendments

DATE: January 10, 2001

SENATE AMENDMENT COMMITTEE
AMENDMENT NO. 1
DATE Jan. 11, 2001
BILL NO. SB4

The following amendment is based upon our discussion this morning. What I have done is taken John's language creating a presumptive probationary period and combined it with language inspired by Jim's amendment on temporary employees. I have stretched the presumptive probationary period out to 12 months. I did this because I think if the legislature goes so far as to impose some kind of probationary period it should be a substantial period. Of course employers can make it longer or shorter. I don't feel strongly about this and if you two think a shorter period is better I will go along with that. The temporary language is meant to protect an employee from the situation when a person is hired, with no written contract, for a special purpose or project that lasts longer than the employer's probationary period. This language on temporary employment becomes even more important if the 12 month probationary language is reduced to 6 or 8 months. The new language is all found in the new subsection (2) of 39-2-904. If adopted that subsection would read as follows:

"(2) During a probationary period employment may be terminated at the will of either the employer or the employee on notice to the other for any reason considered sufficient by the terminating party. The probationary period of employment shall be the longer of 12 months or 2080 hours worked from the date of hire, unless the employer prior to or at the time of hire establishes a different probationary period. Employees hired on a temporary basis for specific assignments or projects shall be presumed to be probationary employees, which presumption can be overcome by a contract or employer policy applicable to the employee indicating a contrary status."

The amendments would read as follows:

Page 2, line 2. Strike, "of employment established by the employer, the"

Page 2, line 4. After the period add, "The probationary period of employment shall be the longer of 12 months or 2080 hours worked from the date of hire, unless the employer prior to or at the time of hire establishes a different probationary period. Employees hired on a temporary basis for specific assignments or projects shall be presumed to be probationary employees, which presumption can be overcome by a contract or employer policy applicable to the employee indicating a contrary status."

Amend the title as follows:

Page 1, line 8. After "CAUSE;" add, "CREATING A PRESUMPTIVE PROBATIONARY PERIOD; SPECIFYING THE STATUS OF TEMPORARY EMPLOYEES;"

I would explain the amendments as follows (and hopefully Grimes or someone could get this explanation placed in the Committee minutes). "If an employer fails to adopt a formal probationary/permanent system of employment any employee hired without a written contract, under the bill as introduced and under Whidden v. Nerison, would be treated as a permanent employee (i.e., covered by a just cause requirement for termination) from the first day of employment. This situation is likely to work a hardship on small employers without sophisticated personnel systems. Therefore, this amendment specifies that the probationary period is presumed to be one year unless the employer has created a different period of probation. Many employers have shorter periods of probation (6 months being common) and some have longer (University System faculty typically serve a 7 year period of probation). Neither current law nor this amendment affects the right of the employer to establish such probationary periods. In addition, this amendment guards against the possibility that employees hired for specific projects or assignments do not attain permanent status immediately and automatically upon hire. This would clarify that employees such as interns, work study students and others expected to be around only for a specific project or a limited time do not attain the rights of a nonprobationary employee by default."

LET ME KNOW WHAT YOU THINK AND I WILL DRAW UP WHAT WE AGREE TO GO FORWARD WITH.

Page 2, line 4. After the period add, "The probationary period of employment shall be the longer of 12 months or 2080 hours worked from the date of hire, unless the employer prior to or at the time of hire establishes a different probationary period. Employees hired on a temporary basis for specific assignments or projects shall be presumed to be probationary employees, which presumption can be overcome by a contract or employer policy applicable to the employee indicating a contrary status."

Amend the title as Page 2, line 2. Strike, "of employment established by the employer, the"

follows: Page 1, line 8. After "CAUSE;" add, CREATING A PRESUMPTIVE PROBATIONARY PERIOD; SPECIFYING THE STATUS OF TEMPORARY EMPLOYEES,"

SENATE APPROPRIATION COMMITTEE
SENATE REP. 2
DATE Jan. 11, 2001
BILL NO. SB 4

MINUTES

**MONTANA SENATE
57th LEGISLATURE - REGULAR SESSION
COMMITTEE ON JUDICIARY**

Call to Order: By **CHAIRMAN LORENTS GROSFIELD**, on January 12,
2001 at 9:00 A.M., in Room 303 Capitol.

ROLL CALL

Members Present:

Sen. Lorents Grosfield, Chairman (R)
Sen. Duane Grimes, Vice Chairman (R)
Sen. Al Bishop (R)
Sen. Steve Doherty (D)
Sen. Ric Holden (R)
Sen. Walter McNutt (R)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)

Members Excused: Sen. Mike Halligan (D)

Members Absent: None.

Staff Present: Valencia Lane, Legislative Branch
Cecile Tropila, Committee Secretary

Please Note: These are summary minutes. Testimony and
discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: SB 204
Executive Action: SB 7, SB 6, SB 204, SB 1, SB 4,
SB 26

HEARING ON SB 204

Sponsor: SEN. JOHN COBB SD 25 AUGUSTA

Proponents: NONE

Opponents: NONE

Valencia Lane agreed that the definition of defamation needs to be revised. She also said this bill was a complicated bill to draft due to no definition of blacklisting existing.

Withdrawn Motion: SEN. GRIMES withdrew the motion SB 1 DO PASS.

EXECUTIVE ACTION ON SB 4

Motion: SEN. GRIMES moved that SB 4 DO PASS AS AMENDED. Amendments were handed out EXHIBIT(jus09a05).

Discussion:

Valencia Lane explained the amendments and said they create a presumptive probationary period in the instances where someone is hired and if it doesn't specify a probationary period, the law would presume there is a probationary period.

Substitute Motion: SEN. O'NEIL made a substitute motion that SB 4 BE AMENDED adding "seven years probationary period" instead of 12 months.

SEN. O'NEIL stated that he understood the university system has a probationary period of 84 months rather than 12 months and he believed the public should have that same benefit.

SEN. GRIMES remarked that nothing within this current amendment restricts the employers from establishing a longer probationary period than 12 months and it could jeopardize the bill if they were to go over a one year probationary period.

Leroy Schram, Legal Counsel, MT University System, explained the university system's long probationary period and how it is standard throughout the higher education industry. He said that the 12 month period was the default period and that any employer can establish a shorter or longer probationary period.

SEN. O'NEIL asked if at-will employment would work in these cases. **Leroy Schram** explained a case, Whidden vs. Narrison, which an ambiguity was interpreted in the statute and the legislature was having to repeal the at-will statute.

SEN O'NEIL asked if the language dealing with a 12 month probationary period would this clear up the ambiguity. **Leroy Schram** answered yes, it would.

SEN. O'NEIL asked if a seven year probationary period would clear up the ambiguity. **Leroy Schram** answered yes, it would clear up the ambiguity, but other factors would be involved.

SEN O'NEIL asked if the supreme court would strike down the bill if the seven years probationary period was added. **Leroy Schram** said yes, that is a possibility.

Vote: Motion failed 8-1 with **SEN. O'NEIL** voting yes.

Discussion:

SEN. GRIMES raised the point regarding employees, who were hired on a temporary basis for a specific assignment, or for a project and they were presumed to be on a probationary period. He said that within the statute, 19-3-111, a temporary employee is defined as someone who solely works for the university system.

Jim Nyes, Society for Human Resources, commented that the types of employees who may exceed 12 months may be internships or work-study students, who are hired for a time limited purpose. He added that it was important to recognize these employees may be at-will for purposes of the probationary period, but they are still protected by the Wrongful Discharge Act.

SEN. GRIMES asked if all temporary employees would be protected by a probationary period or would this apply to employees only on specific assignments. **Jim Nyes** said that was the intent.

CHAIRMAN GROSFIELD said that language could be added in order for this be made more clear. He wanted to add to Subsection (b) **SEN. GRIMES** agreed that it needs to be reworded.

Motion/Vote: **SEN. GRIMES** moved **SB 4 WITH INSERTION TO SUBSECTION (b) BE AMENDED**. Motion carried unanimously.

Motion/Vote: **SEN. GRIMES** moved that **SB 4 AS AMENDED DO PASS**. Motion carried unanimously.

{Tape 3; Side A}

EXECUTIVE ACTION ON SB 26

Motion: **SEN. HOLDEN** moved **SB 26 BE AMENDED**. Amendments were handed out **EXHIBIT(jus09a06)**.

Discussion:

MINUTES

**MONTANA HOUSE OF REPRESENTATIVES
57th LEGISLATURE - REGULAR SESSION
COMMITTEE ON JUDICIARY**

Call to Order: By **CHAIRMAN JIM SHOCKLEY**, on March 1, 2001 at
8:00 A.M., in Room 137 Capitol.

ROLL CALL

Members Present:

Rep. Jim Shockley, Chairman (R)
Rep. Jeff Laszloffy, Vice Chairman (R)
Rep. Darrel Adams (R)
Rep. Gilda Clancy (R)
Rep. Aubyn A. Curtiss (R)
Rep. Bill Eggers (D)
Rep. Steven Gallus (D)
Rep. Gail Gutsche (D)
Rep. Christopher Harris (D)
Rep. Linda Holden (R)
Rep. Joan Hurdle (D)
Rep. Brad Newman (D)
Rep. Mark Noennig (R)
Rep. Ken Peterson (R)
Rep. Diane Rice (R)
Rep. Bill Thomas (R)
Rep. Merlin Wolery (R)
Rep. Cindy Younkin (R)

Members Excused: Rep. Paul Clark, Vice Chairman (D)
Rep. Jeff Mangan (D)

Members Absent: None.

Staff Present: John MacMaster, Legislative Branch
Mary Lou Schmitz, Committee Secretary

Please Note: These are summary minutes. Testimony and
discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: **SB 4 - 2-19-01**
SB 26 - 2-19-01
SB 29 - 2-19-01

Executive Action: SB 29 - BCI
SB 4 - BCIAA
SB 26 - Table
SB 217 - Table

HEARING ON SB 29

Sponsor: Senator Walter McNutt, SD 50, Sidney said this Bill was requested by the Department of Health and Human Services. It is an Act correcting inconsistencies between Title 41, Chapter 3, relating to Child Abuse and Neglect, and Title 41, Chapter 5, the Youth Court Act. SB 29 will clarify some inconsistencies between the two Acts that are confusing and this Bill will take that language out of the Montana Youth Court Act so the Department of Health and Human Services is not being confused with the Corrections system.

Proponents: Chuck Hunter, Administrator, Child Family Services Division, Department of Public Health. EXHIBIT(juh47a01)

Opponents: None

Questions from Committee Members and Responses: Reps. Hurdle, Noennig to Mr. Hunter.

Closing by Sponsor: Senator McNutt closed the Hearing on SB 29.

{Tape : 1; Side : A; Approx. Time Counter : 0 - 12.3}

HEARING ON SB 4

Sponsor: Senator Grimes, SD 20, Clancy said this Bill originally was requested by the Law, Justice, and Indian Affairs Committee. There are still probationary employees with at-will employment status. In order to preserve that, he went into the wrongful discharge act on Page 2, added language, then the Senate made it a presumptive probationary period. Now if somebody is hired and there is no written probationary period, then from day one, it can be construed that employee is permanent.

This Bill has created a presumptive probationary period of 12 months and it also cleans up the language.

Proponents: Jim Nys, Self-employed Human Resource Consultant. EXHIBIT(juh47a02)

John Cadby, Montana Bankers' Association

Bob Gilbert, on behalf of Riley Johnson, National Federation of Independent Businesses.

Bob Pyfer, Montana Credit Union League

LeRoy Schramm, Legal Counsel, Board of Regents, Montana University System.

Opponents: Mike Meloy, Attorney, Helena

{Tape : 1; Side : A; Approx. Time Counter : 12.3 - 29.8}

Al Smith, Montana Trial Lawyers' Association.

Don Judge, Montana AFL-CIO

Questions from Committee Members and Responses: Reps. Gallus, Peterson, Clancy, Noennig, Rice, Hurdle to Mr. Meloy, Senator Grimes, Mr. Smith, Mr. Schramm, Mr. Judge.

{Tape : 1; Side : B; Approx. Time Counter : 0.1 - 29.7}

{Tape : 2; Side : A; Approx. Time Counter : 0.1 - 12.7}

Closing by Sponsor: Senator Grimes closed the Hearing on SB 4 by saying this Bill will be very good for our employment climate in the State of Montana.

{Tape : 2; Side : A; Approx. Time Counter : 12.7 - 17.7}

HEARING ON SB 26

Sponsor: Senator Ric Holden, SD 1, Glendive said up to 40% of the drivers in Montana evade the law and drive without mandatory liability insurance. This Bill serves to address two issues:
(1) it deals with the uninsured drivers in the penalty section.
(2) it deals with malicious and frivolous litigation.

The owner-operator of a vehicle that does not carry mandatory insurance cannot sue for non-economic damages over and above Montana's financial responsibility limit of \$25,000. They can recover their economic damages, such as medical bills or lost wages, over and above Montana's financial responsibility limit which is \$25,000.

The offender that's breaking the law is only subject to this Bill after he's been caught twice. He then becomes a habitual offender and that's when this Bill takes over. At that point

the driver cannot sue for damages over and above the statutory cap. He stated for the record, the NFIP and the Chamber of Commerce supports the Bill.

{Tape : 2; Side : A; Approx. Time Counter : 17.7 - 24.9}

Proponents: Jacqueline Lenmark, National Insurance Association

Greg Van Horssen, State Farm Insurance Co.

{Tape : 2; Side : A; Approx. Time Counter : 24.9 - 29.3}

{Tape : 2; Side : B; Approx. Time Counter : 0.1 - 0.2}

Webb Brown, Montana Chamber of Commerce

Dwight Easton, Farmers Insurance Co.

Opponents: Al Smith, Montana Trial Lawyers Association,
EXHIBIT(juh47a03)

Claudia Clifford, Insurance Commissioner's Office

Wendy Young, Low Income Families (WEEL)

Questions from Committee Members and Responses: Reps. Harris, Clancy, Peterson, Laszloffy, Noennig, Gutsche to Senator Holden, Mr. Van Horssen, Mr. Smith for further clarification.

{Tape : 2; Side : B; Approx. Time Counter : 0.2 - 29.6}

{Tape : 3; Side : A; Approx. Time Counter : 0.1 - 7.3}

Closing by Sponsor: Senator Holden closed the Hearing on SB 26 by saying this Bill further puts into statute requirements that bar people from tapping your personal resources and those insurance carriers for which premiums are paid and limits the amount of recovery. These are the statutes that deal with the penalties associated with carrying mandatory insurance coverage.

{Tape : 3; Side : A; Approx. Time Counter : 7.3 - 9.6}

EXECUTIVE ACTION ON SB 29

Motion/Vote: REP. CLANCY moved that SB 29 BE CONCURRED IN. #1
Motion carried unanimously 18-0.

EXECUTIVE ACTION ON SB 4

Motion: REP. RICE moved that SB 4 BE CONCURRED IN. #2

Motion: REP. YOUNKIN moved that SB 4 BE AMENDED, conceptually to delete line 6. #3

Discussion: Reps. Younkin, Noennig.

Substitute Motion: REP. NOENNIG made a substitute motion that SB 4 BE AMENDED. #4 Withdrawn.

Discussion: Reps. Peterson, Harris, Hurdle.

Substitute Motion: REP. PETERSON moved that SB 4 BE AMENDED to put a period after "reason" instead would add "or for no reason" and delete line 6. #6

Discussion: Reps. Noennig, Shockley, Peterson, Newman, Laszloffy.

Vote: Peterson Substitute Motion #6 carried 16-2 with Reps. Gutsche and Hurdle voting no.

Motion: REP. YOUNKIN moved that SB 4 BE AMENDED, lines 8 and 9, to delete the words "the longer of twelve months" and insert "six months". #7

Discussion: Rep. Noennig.

Substitute Motion: REP. PETERSON made a substitute motion that SB 4 BE AMENDED to strike lines 7 - 13. #8

Discussion: Reps. Rice, Gutsche, Laszloffy, Noennig, Holden, Younkin.

{Tape : 3; Side : A; Approx. Time Counter : 9.6 - 29.7}

{Tape : 3; Side : B; Approx. Time Counter : 0.1 - 6.0}

Vote: Motion on Peterson Substitute amendment #8 failed on a tie vote 9-9.

Discussion: Mr. MacMaster

Substitute Motion: REP. GALLUS made a substitute motion that SB 4 BE AMENDED to strike lines 7-13. #9

Discussion: Rep. Peterson, Laszloffy, Gallus, Shockley, Gutsche, Newman, Younkin, Adams.

Vote: Gallas substitute motion #9 failed 8-11 with Reps. Shockley, Laszloffy, Adams, Clancy, Curtiss, Harris, Holden, Noennig, Rice, Wolery and Younkin voting no.

Substitute Motion/Vote: REP. PETERSON made a substitute motion that SB 4 BE AMENDED to change from six months to ninety days. #10 Motion failed 9-10 with Reps. Shockley, Laszloffy, Adams, Clancy, Curtiss, Holden, Noennig, Rice, Wolery and Younkin voting no.

Substitute Motion/Vote: REP. NOENNIG made a substitute motion that SB 4 BE AMENDED, Line 8, Page 2. #11 Motion carried unanimously. 19-0

Motion: REP. YOUNKIN moved that SB 4 BE AMENDED, 3rd amendment. #12

Substitute Motion: REP. NOENNIG made a substitute motion that SB 4 BE AMENDED to delete language on line 7, and delete lines 10-13. #13

Discussion: Reps. Peterson, Laszloffy, Shockley.

Motion/Vote: REP. NOENNIG moved that SB 4 BE CONCURRED IN AS AMENDED. #14 Motion carried 13-7 with Reps. Clark, Eggers, Gallus, Gutsche, Hurdle, Mangan and Newman voting no.

{Tape : 3; Side : B; Approx. Time Counter : 4.1 - 29.6}

{Tape : 4; Side : A; Approx. Time Counter : 0.1 - 2.3}

Testimony of James A Nys on Senate Bill 4
House Business and Labor Committee
March 1, 2001

EXHIBIT 2
DATE 3-1-01
SB 4

Mr. Chairman, members of the Committee, I am Jim Nys. I am a self-employed human resource consultant who works with Montana employers to help them deal with employment related issues, problems and claims. I am also the volunteer representative of the 600 members of the Society for Human Resource Management.

Senate Bill 4 was originally introduced to conform Montana code to the Montana Supreme Court Decision in Whidden v. Nerison (1999 MT 110, May 25, 1999). In that decision, the Montana Supreme Court found that:

"Sections 39-2-503 [the At-Will Staute] and 39-2-904(2), MCA [the Wrongful Discharge Act], clearly conflict. Under § 39-2-503, MCA, a non-probationary at-will employee may be discharged without good cause. However, under §39-2-904(2), MCA, an employer must have good cause before discharging a non-probationary employee." [Bracketed Material Added]

In order to resolve the conflict, the court declared:

"... we hold... that the WDFEA has superseded and impliedly repealed the at-will act.... The plain meaning of § 39-2-904(2), MCA, ... is that outside of the probationary period of employment, an employer may not discharge an employee without good cause... However, we recognize that under § 39-2-904(2), MCA, the good cause requirement applies to an employee upon completion of a probationary period. The employer must define the probationary period at the outset of an employment relationship, and the employer has the burden of showing that a probationary period was in effect at the time of a discharge."

The original version of SB 4 sought to clarify the WDFEA by adding language to clarify that employment during a probationary period could be terminated "at the will of either the employer or the employee for any reason considered sufficient by the terminating party." The bill had broad support. Only Leroy Schramm, representing the Montana University System, had concerns with the Bill. One of his primary concerns related to wanting to protect small and unsophisticated employers who might not know that they had a responsibility under the Whidden decision to notify employees of their probationary period to invoke the protection that a probationary period gives employers.

Following the Senate hearing, I was asked by Senator Grimes to meet with Leroy Schramm of the University System, the only opponent to SB 4 in the hearing, to work out his concerns with SB 4. He, I and John Sullivan, a respected employment law attorney, met to find consensus language. Our meetings generated two suggestions: 1) to establish a presumptive probationary period and 2) to expressly state that individuals hired on a temporary basis for specific projects or assignments are presumed to be probationary for the entire period of the temporary assignment. These presumptions may be overcome by evidence that the employer has established a different probationary period or different status for an employee. Both amendments were adopted by the Senate.

These amendments create a bill that would implement what many employers believe is already the case- that new employees are automatically in probation - in a way that is designed not to conflict with the Whidden Decision.

This bill, as ammended, has the support of the Society for Human Resource Management. We urge you give SB 4 a do pass recommendation.

James A. Nys
910 E. Lyndale, Helena, MT 59601

443-7169

pplusmt@personnel-plus.com

House of Representatives

Roll Call Vote

JUDICIARY

COMMITTEE

DATE 3-01-01 Bill NO. SB4 NUMBER #2

MOTION:

Rep. Rice moved Be Concurred In

Name	AYE	NO
Rep. Jim Shockley, Chairman		
Rep. Jeff Laszloffy, Vice Chair Majority		
Rep. Paul Clark, Vice Chair Minority		
Rep. Darrel Adams		
Rep. Gilda Clancy		
Rep. Aubyn Curtiss		
Rep. Bill Eggers		
Rep. Steve Gallus		
Rep. Gail Gutsche		
Rep. Christopher Harris		
Rep. Linda Holden		
Rep. Joan Hurdle		
Rep. Jeff Mangan		
Rep. Brad Newman		
Rep. Mark Noennig		
Rep. Ken Peterson		
Rep. Diane Rice		
Rep. Bill Thomas		
Rep. Merlin Wolery		
Rep. Cindy Younkin		

House of Representatives

Roll Call Vote

JUDICIARY

COMMITTEE

DATE 3-01-01 Bill NO. SB4 NUMBER #3MOTION: Rep. Younkin moved a conceptual amendment to delete line 6

Name	AYE	NO
Rep. Jim Shockley, Chairman		
Rep. Jeff Laszloffy, Vice Chair Majority		
Rep. Paul Clark, Vice Chair Minority		
Rep. Darrel Adams		
Rep. Gilda Clancy		
Rep. Aubyn Curtiss		
Rep. Bill Eggers		
Rep. Steve Gallus		
Rep. Gail Gutsche		
Rep. Christopher Harris		
Rep. Linda Holden		
Rep. Joan Hurdle		
Rep. Jeff Mangan		
Rep. Brad Newman		
Rep. Mark Noennig		
Rep. Ken Peterson		
Rep. Diane Rice		
Rep. Bill Thomas		
Rep. Merlin Wolery		
Rep. Cindy Younkin		

House of Representatives

Roll Call Vote

Withdraw

JUDICIARY

COMMITTEE

DATE 3-6-01 BILL NO. SB 4 NUMBER #4

MOTION:

*Rep. Noennig moved a substitute
amendment, defer to you*

Name	AYE	NO
Rep. Jim Shockley, Chairman		
Rep. Jeff Laszloffy, Vice Chair Majority		
Rep. Paul Clark, Vice Chair Minority		
Rep. Darrel Adams		
Rep. Gilda Clancy		
Rep. Aubyn Curtiss		
Rep. Bill Eggers		
Rep. Steve Gallus		
Rep. Gail Gutsche		
Rep. Christopher Harris		
Rep. Linda Holden		
Rep. Joan Hurdle		
Rep. Jeff Mangan		
Rep. Brad Newman		
Rep. Mark Noennig		
Rep. Ken Peterson		
Rep. Diane Rice		
Rep. Bill Thomas		
Rep. Merlin Wolery		
Rep. Cindy Younkin		

House of Representatives

Roll Call Vote

JUDICIARY

COMMITTEE

DATE 3-01-01 BILL NO. SB4 NUMBER #5MOTION: Rep. Peterson moved a substitute
amendment to put a period after "reason".
Motion carried 16-2.

Name	AYE	NO
Rep. Jim Shockley, Chairman	✓	
Rep. Jeff Laszloffy, Vice Chair Majority	✓	
Rep. Paul Clark, Vice Chair Minority	✓	
Rep. Darrel Adams	✓	
Rep. Gilda Clancy	✓	
Rep. Aubyn Curtiss	✓	
Rep. Bill Eggers		
Rep. Steve Gallus	✓	
Rep. Gail Gutsche		✓
Rep. Christopher Harris	✓	
Rep. Linda Holden	✓	
Rep. Joan Hurdle		✓
Rep. Jeff Mangan	✓	
Rep. Brad Newman	✓	
Rep. Mark Noennig	✓	
Rep. Ken Peterson	✓	
Rep. Diane Rice	✓	
Rep. Bill Thomas		
Rep. Merlin Wolery	✓	
Rep. Cindy Younkin	✓	

14 2
Motion Carried

House of Representatives

Roll Call Vote

JUDICIARY

COMMITTEE

DATE 3-01-01 Bill NO. SB4 NUMBER # 7

MOTION:

Rep. Younkin moved amendment
line 619

Name	AYE	NO
Rep. Jim Shockley, Chairman		
Rep. Jeff Laszloffy, Vice Chair Majority		
Rep. Paul Clark, Vice Chair Minority		
Rep. Darrel Adams		
Rep. Gilda Clancy		
Rep. Aubyn Curtiss		
Rep. Bill Eggers		
Rep. Steve Gallus		
Rep. Gail Gutsche		
Rep. Christopher Harris		
Rep. Linda Holden		
Rep. Joan Hurdle		
Rep. Jeff Mangan		
Rep. Brad Newman		
Rep. Mark Noennig		
Rep. Ken Peterson		
Rep. Diane Rice		
Rep. Bill Thomas		
Rep. Merlin Wolery		
Rep. Cindy Younkin		

House of Representatives

Roll Call Vote

JUDICIARY

COMMITTEE

DATE 3-01-01 Bill NO. SB4 NUMBER # 8MOTION: Rep. Peterson moved a substitute
amended to strike lines 7-13
Motion passed 9-9

Name	AYE	NO
Rep. Jim Shockley, Chairman		✓
Rep. Jeff Laszloffy, Vice Chair Majority		✓
Rep. Paul Clark, Vice Chair Minority	✓	
Rep. Darrel Adams		✓
Rep. Gilda Clancy		✓
Rep. Aubyn Curtiss		✓
Rep. Bill Eggers		
Rep. Steve Gallus	✓	
Rep. Gail Gutsche	✓	
Rep. Christopher Harris		✓
Rep. Linda Holden	✓	
Rep. Joan Hurdle	✓	
Rep. Jeff Mangan	✓	
Rep. Brad Newman	/	
Rep. Mark Noennig	/	
Rep. Ken Peterson	/	
Rep. Diane Rice		/
Rep. Bill Thomas		
Rep. Merlin Wolery		✓
Rep. Cindy Younkin		✓

9

9

House of Representatives

Roll Call Vote

JUDICIARY

COMMITTEE

DATE 3-01-01 Bill NO. SB4 NUMBER #9

MOTION:

*Rep. Gallus moved a substitute
 to strike
 lines 7-13 motion failed 8-11*

Name	AYE	NO
Rep. Jim Shockley, Chairman		✓
Rep. Jeff Laszloffy, Vice Chair Majority		✓
Rep. Paul Clark, Vice Chair Minority	✓	
Rep. Darrel Adams		✓
Rep. Gilda Clancy		✓
Rep. Aubyn Curtiss		✓
Rep. Bill Eggers	✓	
Rep. Steve Gallus	✓	
Rep. Gail Gutsche	✓	
Rep. Christopher Harris		✓
Rep. Linda Holden		✓
Rep. Joan Hurdle	✓	
Rep. Jeff Mangan	✓	
Rep. Brad Newman	✓	
Rep. Mark Noennig		✓
Rep. Ken Peterson	✓	
Rep. Diane Rice		✓
Rep. Bill Thomas		
Rep. Merlin Wolery		✓
Rep. Cindy Younkin		✓

8

11

House of Representatives

Roll Call Vote

JUDICIARY

COMMITTEE

DATE 3-01-01 Bill NO. SB4 NUMBER #10

MOTION:

Rep. Peterson moved a substitute motion to change from 6 months to 90 days
Motion defeated 9-10

Name	AYE	NO
Rep. Jim Shockley, Chairman		✓
Rep. Jeff Laszloffy, Vice Chair Majority		✓
Rep. Paul Clark, Vice Chair Minority	✓	
Rep. Darrel Adams		✓
Rep. Gilda Clancy		✓
Rep. Aubyn Curtiss		✓
Rep. Bill Eggers	✓	
Rep. Steve Gallus	✓	
Rep. Gail Gutsche	✓	
Rep. Christopher Harris	✓	
Rep. Linda Holden		✓
Rep. Joan Hurdle	✓	
Rep. Jeff Mangan	✓	
Rep. Brad Newman	✓	
Rep. Mark Noennig		✓
Rep. Ken Peterson	✓	
Rep. Diane Rice		✓
Rep. Bill Thomas		
Rep. Merlin Wolery		✓
Rep. Cindy Younkin		✓

9

10

House of Representatives

Roll Call Vote

JUDICIARY

COMMITTEE

DATE 3-01-01 Bill NO. 284 NUMBER #11

MOTION:

Rep. Noennig moved a substitute
with to amend page 2, line 8Motion carried unanimously 19-0

Name	AYE	NO
Rep. Jim Shockley, Chairman	✓	
Rep. Jeff Laszloffy, Vice Chair Majority	✓	
Rep. Paul Clark, Vice Chair Minority	✓	
Rep. Darrel Adams	✓	
Rep. Gilda Clancy	✓	
Rep. Aubyn Curtiss	✓	
Rep. Bill Eggers	✓	
Rep. Steve Gallus	✓	
Rep. Gail Gutsche	✓	
Rep. Christopher Harris	✓	
Rep. Linda Holden	✓	
Rep. Joan Hurdle	✓	
Rep. Jeff Mangan	✓	
Rep. Brad Newman	✓	
Rep. Mark Noennig	✓	
Rep. Ken Peterson	✓	
Rep. Diane Rice	✓	
Rep. Bill Thomas		
Rep. Merlin Wolery	✓	
Rep. Cindy Younkin	✓	

19

0

House of Representatives

Roll Call Vote

JUDICIARY

COMMITTEE

DATE 3-01-01 Bill NO. SB4 NUMBER #12MOTION: Rep. Younk moved amendment

Name	AYE	NO
Rep. Jim Shockley, Chairman		
Rep. Jeff Laszloffy, Vice Chair Majority		
Rep. Paul Clark, Vice Chair Minority		
Rep. Darrel Adams		
Rep. Gilda Clancy		
Rep. Aubyn Curtiss		
Rep. Bill Eggers		
Rep. Steve Gallus		
Rep. Gail Gutsche		
Rep. Christopher Harris		
Rep. Linda Holden		
Rep. Joan Hurdle		
Rep. Jeff Mangan		
Rep. Brad Newman		
Rep. Mark Noennig		
Rep. Ken Peterson		
Rep. Diane Rice		
Rep. Bill Thomas		
Rep. Merlin Wolery		
Rep. Cindy Younk		

House of Representatives

Roll Call Vote

JUDICIARY

COMMITTEE

DATE 3-01-01 Bill NO. SB4 NUMBER #13

MOTION:

Rep. Noennig moved a substitute
amendment on floor 7Motion carried unanimously 19-0

Name	AYE	NO
Rep. Jim Shockley, Chairman	✓	
Rep. Jeff Laszloffy, Vice Chair Majority	✓	
Rep. Paul Clark, Vice Chair Minority	✓	
Rep. Darrel Adams	✓	
Rep. Gilda Clancy	✓	
Rep. Aubyn Curtiss	✓	
Rep. Bill Eggers	✓	
Rep. Steve Gallus	✓	
Rep. Gail Gutsche	✓	
Rep. Christopher Harris	✓	
Rep. Linda Holden	✓	
Rep. Joan Hurdle	✓	
Rep. Jeff Mangan	✓	
Rep. Brad Newman	✓	
Rep. Mark Noennig	✓	
Rep. Ken Peterson	✓	
Rep. Diane Rice	✓	
Rep. Bill Thomas		
Rep. Merlin Wolery	✓	
Rep. Cindy Younkin	✓	

19

0

House of Representatives

Roll Call Vote

JUDICIARY

COMMITTEE

DATE 3-01-01 BILL NO. SB4 NUMBER #14

MOTION:

Rep. Noennig moved Be Concurred
In as Amended

Name	AYE	NO
Rep. Jim Shockley, Chairman	✓	
Rep. Jeff Laszloffy, Vice Chair Majority	✓	
Rep. Paul Clark, Vice Chair Minority		✓
Rep. Darrel Adams	✓	
Rep. Gilda Clancy	✓	
Rep. Aubyn Curtiss	✓	
Rep. Bill Eggers		✓
Rep. Steve Gallus		✓
Rep. Gail Gutsche		✓
Rep. Christopher Harris	✓	
Rep. Linda Holden	✓	
Rep. Joan Hurdle		✓
Rep. Jeff Mangan		✓
Rep. Brad Newman		✓
Rep. Mark Noennig	✓	
Rep. Ken Peterson	✓	
Rep. Diane Rice	✓	
Rep. Bill Thomas	✓	
Rep. Merlin Wolery	✓	
Rep. Cindy Younkin	✓	

13

7



HOUSE STANDING COMMITTEE REPORT

March 1, 2001

Page 1 of 2

Mr. Speaker:

We, your committee on Judiciary recommend that Senate Bill 4 (third reading copy - blue) be concurred in as amended.

Signed:

Representative Jim Shockley, Chair

To be carried by Representative Darrel Adams

And, that such amendments read:

1. Title, page 1, line 6 through line 7.

Strike: "CONSIDERED" on line 6 through "PARTY" on line 7

Insert: "OR FOR NO REASON"

2. Title, page 1, line 7 through line 8.

Strike: "SPECIFYING" on line 7 through "EMPLOYEES;" on line 8

3. Page 1, line 27 through line 28.

Strike: "-- TEMPORARY EMPLOYMENT"

4. Page 2, line 6.

Strike: "considered sufficient by the terminating party"

Insert: "or for no reason"

5. Page 2, line 7.

Strike: "EXCEPT AS PROVIDED IN SUBSECTION (2) (C), IF"

Insert: "If"

6. Page 2, line 8.

Following: the first "PERIOD"

Insert: "or provide that there is no probationary period"

Following: "HIRE,"

Insert: "there is"

Committee Vote:

Yes 13, No 7.

471518SC.hdc

3-2

Strike: "MUST BE THE LONGER OF 12"
Insert: "of 6"

7. Page 2, line 9.

Strike: "OR 2,080 HOURS WORKED"

8. Page 2, line 10 through line 13.

Strike: subsection (C) in its entirety

- END -

MONTANA HOUSE OF REPRESENTATIVES
VISITORS REGISTER

DATE 3-1-01

BILL NO. SB 4

SPONSOR(S) Sen. Gruner

TYPE
PROPOSER (P) OPPONENT (O) INFORMATIONAL (I)

PLEASE PRINT

PLEASE CIRCLE	NAME	ADDRESS	REPRESENTING
☒ POI	Jim Nys	Helena	Self S.H. Nys
☐ POI	JOHN CADDY	HELENA	MT BANKERS ASSN
☐ POI	Bob Pyler	Helena	MT Credit Union League
☒ POI	Bob Gilbert	Helena	N. F. I. B.
☐ POI	Don Judge	Helena	MT AFL-CIO
☒ POI	WEBB BROWN	HELENA	MT CHAMBER
☐ POI	Al Smith	Helena	MT LA
☐ POI			
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Please leave prepared testimony with Secretary. Witness Statement forms are available if you care to submit written testimony

S:visitor register.fm

MINUTES

MONTANA SENATE
57th LEGISLATURE - REGULAR SESSION
CONFERENCE COMMITTEE ON HOUSE AMENDMENTS TO SENATE BILL 4

Call to Order: By CHAIRMAN DUANE GRIMES, on March 23, 2001 at
4:00 P.M., in Room 350 Capitol.

ROLL CALL

Members Present:

Sen. Duane Grimes, Chairman (R)
Rep. Jim Shockley, Vice Chairman (R)
Sen. Vicki Cocchiarella (D)
Sen. Bob DePratu (R)
Rep. Steven Gallus (D)

Members Excused: Rep. Darrel Adams (R)

Members Absent: None.

Staff Present: John MacMaster, Legislative Branch
Mary Gay Wells, Secretary

Please Note: These are summary minutes. Testimony and
discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: SB 4; 3/20/2001

Executive Action: SB 4

{Tape : 1; Side : A; Approx. Time Counter : 0}

HEARING ON SB 4

Informational Testimony:

Al Smith, MT Trial Lawyers Assoc.
LeRoy Schramm, Legal Counsel, MT University System

Questions and Comments from Committee Members and Responses:

CHAIRMAN DUANE GRIMES explained the purpose of the Conference Committee. Because the MT Supreme Court held that "at-will" employment is impliedly repealed, SB 4 is intending not only to repeal the "at-will" statute, but it will also establish that a probationary period is specified as an "at-will" issue in the Wrongful Discharge Act.

This began with a twelve month probationary period plus there was an amendment put on in the Senate to take care of the University System employees. On page 2, lines 11-14, that language was suppose to take care of the University System employees who are work study students. The Senate was ambivalent about that if it was just a university issue. There was some concern on the Senate floor that this might be a loophole for some employer to call all their employees temporary.

He had a letter **EXHIBIT(ccs66sb0004a01)** addressed to **REP. JIM SHOCKLEY** from **LeRoy H. Schramm**. He read some of the pertinent parts. "The House amendments leave the University System's thousands of work study student employees, who were formerly considered to be "at-will" employees, in an uncertain status. Under the current SB 4 such employees will attain "for cause" status in the midst of an academic year. If SB 4 were to become law in this form, the University System would be left with two options for these temporary student employees. First, it could create specific term contracts for them. But if the University did so these temporary student employees could only be terminated "for cause" during the entire term of the contracts. And, as many wrongful discharge cases show, having "cause" to terminate someone is one thing, and being dragged into court to prove it is another; the latter being time consuming, uncertain and, win or lose, expensive. Second, the University could adopt a specific probationary period for its work study employees. This also is not a good option since the creation of a probationary period implies that upon the completion of the probation the employee attains "permanent" or "for cause" status; the very thing we wish to avoid for these short term employees."

That didn't really answer his question. He then asked why couldn't they adopt a 12 month probationary period on the side.

REP. SHOCKLEY felt that the procedure now is to get them to sign a contract and they frequently don't. There needs to be a contract somewhere. The University was concerned about line 9. If they use work study people, there should be a contract to limit them to a specific period of time.

CHAIRMAN GRIMES said that the letter is saying a permanent contract equates to a permanent job. Then they could only terminate "for cause." That does not make sense.

SEN. BOB DEPRATU said a contract can say the person is hired for 12 months but under certain circumstances it could be less.

John MacMaster offered that if a person is in the probationary period, they can be fired for no reason.

Al Smith offered a letter from the MT Trial Lawyers **EXHIBIT(ccs66sb0004a02)**. He then answered that they have had contracts where a two week notice for no cause is written.

CHAIRMAN GRIMES asked **Mr. MacMaster** to explain if there was anything to prevent the University from writing contracts just like **Mr. Smith** had just mentioned.

Mr. MacMaster responded that on lines 7 and 8, it states that, "if an employer does not establish a specific probationary period or provide that there is no probationary period prior to or at the time of hire, there is a probationary period of 6 months from the date of hire. This would show what would happen if the employer does not establish a specific probationary period.

REP. SHOCKLEY declared that the University could establish a policy concerning probationary periods for work study programs. Many are concerned about being sued. The amount of wages, at minimum wage, is not worth suing over.

SEN. VICKI COCCHIARELLA stated it seemed that everyone was agreeing to the House amendments.

CHAIRMAN GRIMES said yes, it seemed so at this point. He explained his reasons for bringing the bill into a Conference Committee. It would allow the University System to have one last shot.

SEN. COCCHIARELLA stated that basically the issue is they do not know how to deal with their work study students. She did not sympathize with their dilemma. Work study students sign all kinds of papers. This could be made a part of their policy and take care of any concern on their part. A work study student is on a probationary or "at-will" status.

CHAIRMAN GRIMES said their other argument was the change back to 12 months. It would be good for all small employers in the state who do not have formal written policies. Employers would have 12 full months to evaluate a new employee before the employee

attains a "for cause" termination rights. So, aside from the University System, would the Committee want to talk the House into going back to 12 months. He pointed out 12 months would allow Montana's natural resource ranchers, who have seasonal work, to hire temporary help in an "at-will" status.

SEN. COCCHIARELLA offered that there are contracts that could handle this situation.

REP. SHOCKLEY said that as a rancher, when they hire seasonal work, they don't even have to write that down. That is an oral contract.

CHAIRMAN GRIMES thought there could be some language added in line 11.

SEN. BOB DEPRATU said that 90 days had been used forever and if an employer can't decide in 90 days whether to keep a person on or let them go, that is not very good.

John MacMaster held that if the Committee takes the bill back to its original form, it would not make sense. If the House amendments are left in and change the six months to 12 months, that would be okay.

Al Smith confirmed that there are certain contracts that cannot be oral and must be written if longer than a year. Less than a year, an oral contract is acceptable.

CHAIRMAN GRIMES did not understand what the University's problem was if that was correct. Most students work just during the school year which is less than 12 months.

John MacMaster offered that the University goes looking for problems. They aren't facing lawsuits. They have never been sued. They want the Legislature to pass a statute that would address their concerns.

CHAIRMAN GRIMES explained to **LeRoy Schramm** what the Committee had been talking about. Basically, under current law, any oral contract is good if less than 12 months. In this bill, anything specified, even if it is longer than six months would be valid. The University System seemed to be covered. The University could specify a different probationary period either by contract or by policy.

Al Smith explained that, as discussed, even an oral contract for services less than 12 months is acceptable. The University might have a problem with the oral contract. A professor might tell a

work study student that as long as the student is at the University, he/she would have a job in his department. It would be better to have it in policy. If the student is put on a specific-term contract, then the University would have to have cause to terminate them during that contract.

SEN. COCCHIARELLA reiterated that the student situations are always "at will." The student can leave or the University can end their employment. She asked why the University couldn't do that.

LeRoy Schramm said that one cannot have an indefinitely "at will" contract.

SEN. COCCHIARELLA said that students are never hired for an indefinite period. They don't go more than 12 months. Each year they have to sign for their work study. They have to re-qualify every single year.

LeRoy Schramm offered that the University could state that each new year begin a new employment and not a continuation of last year's employment. He did feel that would make the student perpetually on probation and and thought the Supreme Court might not like that.

REP. SHOCKLEY stated that no one would sue the University over this. There is no money in that.

CHAIRMAN GRIMES thought there might be ramifications on unemployment when someone becomes a permanent employee and is not released for cause. They might not be able to sue but they could allege they were released not for good cause and collect unemployment.

LeRoy Schramm said there was an exception in federal law for work study students. That would not be a problem.

REP. SHOCKLEY suggested that lines 11-14 be re-inserted.

LeRoy Schramm felt that would be good. The words "not to exceed 12 months" could be inserted after the word "basis."

John MacMaster explained why lines 11-14 were taken out. There was testimony in House Judiciary that showed this language was subject to abuse. The computer dot com companies were brought up. A person could work there for two or three years and they were still temporary and still on probation. Lawsuits have been started over this.

SEN. COCCHIARELLA was concerned about putting lines 11-14 back in because of the possibility of abuses.

SEN. DEPRATU offered that if one were just hiring for a regular, on-going position, those lines would cover that.

CHAIRMAN GRIMES offered to insert the word "temporary" on line 11 after "specific."

SEN. COCCHIARELLA felt that after hearing the testimony she was not comfortable with re-inserting these lines or the extra words. Telemarketing jobs at minimum wage are notorious for keeping their people on a temporary status.

CHAIRMAN GRIMES said that these lines would make people permanent after 12 months no matter what the company would say at the beginning of the employment. Whereas, right now, it could go on endlessly. This would limit it to 12 months. This would be a more honest way to do it because otherwise that same company could say they would put them on probation for 12 months.

John MacMaster said to remember this would make them a temporary employee for purposes of the statute that says you can only discharge a person for cause except a person on probation. This would not make them a temporary employee for any other reason.

{Tape : 1; Side : B; Approx. Time Counter : 0}

The committee felt they were heading in the right direction. **Al Smith** was asked if there were some way to tighten the language to make sure the typical fly-by-night companies can't use this as opposed to the probationary period.

Al Smith said it did not make any difference. If they are temporary, they are probationary. The courts would look at this as their first presumption and the employees would fall under part (b). Employers are going to have to do something to designate a person as temporary.

CHAIRMAN GRIMES offered to change the "presumption." He said that lines 11 and 12 should be re-inserted and add "as confirmed by a contract."

John MacMaster said lines 13 and 14 didn't really add anything.

LeRoy Schramm also felt that lines 13 and 14 (the second sentence) did not add anything. He explained why it was in there in the first place. When this section had no limit and you could have a fairly long, specific assignment, the employer still might

want to create some sort of probationary period. This was meant to allow that kind of situation. If a limit is added, the need for the last sentence disappears.

SEN. COCCHIARELLA wanted to know the purpose of the language that the House took out and what the Committee is trying to put back in could have unintended consequences.

CHAIRMAN GRIMES offered that the Committee is trying to help the unsophisticated employer who does not have a probationary period and wants to hire someone on a temporary basis, to allow them to have something other than a presumptive six months.

SEN. COCCHIARELLA was concerned about the person who does not know their rights. Employers need to say the job is temporary or have a contract stating it is a temporary job.

CHAIRMAN GRIMES offered that an oral contract for a temporary job is sufficient to assume probation.

Al Smith stated that a person hired for a temporary position would have a hard time arguing in court that he was supposed to be a full time employee when there was no more work to be done.

EXECUTIVE ACTION ON SB 4

Motion: **REP. SHOCKLEY** MOVED THAT SB 4 BE AMENDED as follows:

Section 2, (c) An employee who is hired on a temporary basis NOT TO EXCEED 12 MONTHS for a specific assignment or project is presumed to be a probationary employee for the entire period of the temporary assignment or project.

Discussion:

SEN. COCCHIARELLA said if someone is hired for a temporary assignment that is 13 months long, then they would fall into the six month probationary period, unless there is another policy.

CHAIRMAN GRIMES said that once they go past 12 months, they are a permanent employee.

LeRoy Schramm offered that if someone is hired for a specific term that is stated such as 13 months or whatever, they would be excluded from this statute.

SEN. DEPRATU felt the language was good for employers. As an employer it is necessary they be specific; but as an employee it is their responsibility to determine exactly what the conditions

are that they would be signing up for. He has interviewed many potential employees and one of the first questions is: "Is this a permanent position or temporary?"

Al Smith said that if a person is hired on a temporary basis and there is not a contract, the statute sets it at 12 months. After that person has worked 12 months, they are past probation.

CHAIRMAN GRIMES restated the amendment. A presumptive probationary period has been created for six months for those employers without a written contract or policy for the hiring of a person for a temporary position or a specified period of time.

Vote: The motion that **the AMENDMENT TO SB 4 BE ADOPTED** carried 5-0.

ADJOURNMENT

Adjournment: 5:15 P.M.

SEN. DUANE GRIMES, Chairman

MARY GAY WELLS, Secretary

DG/MW

EXHIBIT (ccs66sb0004aad)



THE MONTANA UNIVERSITY SYSTEM

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COMMISSIONER OF HIGHER EDUCATION

OFFICE OF LEGAL COUNSEL

March 19, 2001

EXHIBIT NO. 1
DATE 3-23-01
BILL NO. 564

Representative Jim Shockley
State Capitol
Helena, MT 59620

RE: Conference Committee on Wrongful Discharge Act Bill (SB 4-Grimes)

Dear Representative Shockley:

Thank you for speaking with me last week regarding SB 4, for which you are a conference committee member. Because the rush of other business cut our discussion short I fear that I did not state the points I wished to make as cogently as I might have. I hope this letter corrects that failure of mine. SB 4 amends the Wrongful Discharge from Employment Act in response to a Supreme Court decision last year that abolished "at-will" employment. This decision meant that when employers do not establish a probationary period by written contract or personnel policy the employees they hire immediately attain so-called "permanent" status, meaning they may only be terminated "for cause." Thus, even very short term employees can file suit under the Wrongful Discharge Act and force the employer to prove to a jury that the employer has "good cause" for the termination.

SB 4 as passed by the Senate did two things. First, it created a presumptive probationary period of 12 months for new employees. This only applies if the employer has not created a specific probationary period (which could be either shorter or longer than 12 months). Second, it established a class of temporary employees hired for a specific job of limited duration who were to be treated as probationary employees for the duration of their employment. The House lowered the presumptive probationary period from 12 to 6 months and deleted the second change (the temporary employee exception) completely.

The House amendments leave the University System's thousands of work study student employees, who were formerly considered to be "at-will" employees, in an uncertain status. Under the current SB 4 such employees will attain "for cause" status in the midst of an academic year. If SB 4 were to become law in this form, the University System would be left with two options for these temporary student employees. First, it could create specific term contracts for them. But if the University did so these temporary student employees could only be terminated "for cause" during the entire term of the contracts. And, as many wrongful discharge cases show, having "cause" to terminate someone is one thing, and being dragged into court to prove it is another; the latter being time consuming, uncertain and, win or lose, expensive. Second, the University could adopt a specific probationary period for its work study employees. This also is

MONTANA STATE UNIVERSITY — Campuses at Billings, Bozeman, Great Falls, and Havre

THE UNIVERSITY OF MONTANA — Campuses at Butte, Dillon, Helena, and Missoula

Dawson Community College (Glendive) — Flathead Valley Community College (Kalispell) — Miles Community College (Miles City)

Representative Jim Shockley

March 19, 2001

Page 2

not a good option since the creation of a probationary period implies that upon the completion of the probation the employee attains "permanent" or "for cause" status; the very thing we wish to avoid for these short term employees.

The University System's problem can be solved by reinstating the 12 month presumptive probationary period. Since work study students are employed for the academic year they would always remain in a probationary or at-will status. This change would also benefit several thousand small Montana employers who do not have formal written personnel policies containing specific probationary periods. With this change these employers would have a full 12 months to evaluate a new employee before the employee attains "for cause" termination rights as a matter of law.

Finally, it is important to remember that this bill does not in any way affect employees covered by collective bargaining contracts. The Wrongful Discharge Act already excludes these employees from its coverage and this bill does not change that. While moving the 6 months presumptive probationary period up to 12 months may lose a few votes for the bill, this should not be a big problem because the bill passed by wide margins in both houses (72-28 and 43-7).

Sincerely,

A handwritten signature in dark ink, appearing to read "LeRoy H. Schramm", with a long horizontal flourish extending to the right.

LeRoy H. Schramm
Chief Legal Counsel

xc: Senator Duane Grimes ✓

EXHIBIT NO. 2
DATE 3-23-01
BILL NO. SB 4

Directors:

Wade Dahood
Director Emeritus
Lawrence A. Anderson
Roberta Anner-Hughes
Elizabeth A. Best
Randy Bishop
Douglas A. Buxbaum
Michael D. Cok
Karl J. Englund
Victor R. Halverson
Michael F. Lamb
Sydney E. McKenna
James Manley
Peter M. Meloy
James P. Molloy
Jim Ragain
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Secretary-Treasurer

ATLA Representatives:

Lawrence A. Anderson
ATLA Governor
William A. Rossbach
ATLA Governor
Joe R. Bottomly
ATLA State Delegate
Mark S. Connell
ATLA State Delegate

DATE: March 20, 2001

TO: Conference Committee on SB 4

FROM: Al Smith, Montana Trial Lawyers Association



The Committee should accept the House amendments.

1. Six months is a reasonable probationary period, and gives employers what they could, and should do themselves through a policy.

2. An exclusion for "temporary" positions creates a gaping whole for abuse. There is no need for this provision. The only proponent for this provision, the University system, already has the means at its disposal to take care of their concerns:

A. A policy covering all work study students that explicitly sets a 12 month probationary period.

B. A job description and/or contract for work study positions that sets out a 12 month probationary period. This can be a part of the initial hiring paperwork of W-2 forms, etc.

There was no testimony that the University system has had any problems with work study students that could not be handled by the above means.

There are no good policy reasons not to accept the House amendments to SB 4.



CONFERENCE COMMITTEE

on House amendments to Senate Bill 4

Report No. 1, March 26, 2001

Page 1 of 2

Mr. President and Mr. Speaker:

We, your Conference Committee met and considered House amendments to Senate Bill 4 (reference copy - salmon) and recommend this Conference Committee report be adopted.

For the Senate:

For the House: -

Chair

Vice-Chair

Amendment Coordinator

Secretary of Senate

And, recommend that Senate Bill 4 (reference copy - salmon) be amended as follows:

1. Title, page 1, line 8.

Following: "~~EMPLOYEES,~~"

Insert: "SPECIFYING THE STATUS OF TEMPORARY EMPLOYEES;"

2. Page 2, line 14.

Following: "~~STATUS.~~"

ADOPT

AC SB 4-1

REJECT

681425CC.sjo

SR

Insert: "An employee who is hired on a temporary basis not to exceed 12 months for a specific assignment or project is presumed to be a probationary employee for the entire period of the temporary assignment or project."

- END -

MINUTES

MONTANA SENATE 57th LEGISLATURE - REGULAR SESSION CONFERENCE COMMITTEE ON HOUSE AMENDMENTS TO SENATE BILL 4

Call to Order: By **CHAIRMAN DUANE GRIMES**, on April 19, 2001 at 1:00 P.M., in Room 350 Capitol.

ROLL CALL

Members Present:

Sen. Duane Grimes, Chairman (R)
Rep. Darrel Adams, Vice Chairman (R)
Sen. Bob DePratu (R)
Rep. Steven Gallus (D)
Rep. Jim Shockley (R)

Members Excused: Sen. Vicki Cocchiarella (D)

Members Absent: None.

Staff Present: Melissa Rasmussen, Committee Secretary
John McMaster, Legislative Branch

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary: SB 4

Discussion:

SEN. DUANE GRIMES told the committee he wanted to strike the language that the free conference committee had proposed and stick with the House amendments. He stated that the bill creates a six month presumptive probationary period and strikes "at will employment".

Motion/Vote: **SEN. GRIMES** moved to **STRIKE THE FREE CONFERENCE COMMITTEE AMENDMENTS AND ACCEPT THE HOUSE AMENDMENTS** motion carried 5-0.

There was discussion regarding the need for a new conference committee report. **John McMaster** said he would find out.

ADJOURNMENT

Adjournment: 1:05 P.M.

SEN. DUANE GRIMES, Chairman

MELISSA RASMUSSEN, Secretary

DG/MR

EXHIBIT(ccs88sb0004aad)